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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ABDUL ZAHIR, Defendant and Appellant.	B157504 (Los Angeles County Super. Ct. No. BA 220865)
In re ABDUL ZAHIR, on Habeas Corpus.	B168724

APPEAL from a judgment of the Superior Court of Los Angeles County, Ruth A. Kwan, David S. Wesley, and Kathleen Kennedy-Powell, Judges; ORIGINAL PROCEEDING, petition for writ of habeas corpus. Judgment affirmed as modified; order to show cause issued.

Maxine Weksler, under appointment by the Court of Appeal, for Defendant, Appellant, and Petitioner.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jaime L. Fuster, Supervising Deputy Attorney General, Chung L. Mar, Deputy Attorney General, for Plaintiff and Respondent

Abdul Zahir (defendant) appeals a jury conviction of 12 counts of lewd and lascivious acts with a child under 14 (Pen. Code, § 288, subd. (a)) and one count of continuous sexual abuse of a child (Pen. Code, § 288.5). He contends the trial court failed to conduct an adequate hearing on his request to dismiss his retained counsel, that the application of Penal Code section 803, subdivision (g) to permit prosecution of his offenses after the statute of limitations on them had expired violates the Ex Post Facto Clause of the U.S. Constitution, and that his conviction for violation of Penal Code section 288.5[1] must be dismissed.

Defendant's habeas petition alleges that his retained counsel Nancy Mazza failed to investigate and locate key alibi and impeachment witnesses and was otherwise unprepared for trial, and that her representation prejudiced him because this evidence directly rebuts and discredits the complaining witnesses' testimony at trial. We affirm the judgment and issue an order to show cause, returnable in the Superior Court, for an evidentiary hearing on Zahir's ineffective assistance of counsel claim.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant was convicted of molesting his two pre-teen daughters, L. and S.[2] Defendant, who is Muslim and has three wives, denies engaging in any molestation, and contends his daughters (the complaining witnesses) were motivated to fabricate their testimony.

1. Trial Testimony.

L. was 10 at the time the incidents started.[3] Defendant did not stay with L.'s mother every night because he divided his time between two different houses (and

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[1] All statutory references herein, unless otherwise noted, are to the Penal Code.

[2] Defendant also was charged with molesting his stepdaughter, A., but the jury acquitted him on those counts.

[3] L. was born in January 1980.

wives). Defendant would come in the bathroom while she was showering and pull back the shower curtain to watch her. He would tell her to wash her breasts and between her legs, and would ask her to "wash your titties for me." One time he told her that her pubic hair was getting longer.

When L. was 11 or 12, defendant went bowling with his wife and L. stayed to babysit the other children. Defendant told her he would be back to check on them. When defendant returned, he sat on the sofa next to L., touched her breast, made L. touch his penis and put her mouth on it, and attempted to have intercourse with her. After this incident, defendant continued to touch her on different occasions, and when she was 11 or 12, had intercourse with her. After that, defendant regularly had intercourse with her, and arranged for an abortion after L. became pregnant. L. moved away when she was 14.

S. testified that defendant would sleep at their house several nights a week. When S. was about 12, defendant told her to come into the kitchen and remove her clothes; after she refused, defendant took them off and fondled her. Another time, he came into her bedroom, told her siblings to leave the room, told S. to lie on the bed, and pulled her pants and underwear down, and defendant put his mouth on her vagina. On several occasions, defendant came into her room at night and fondled her. When she was about 13, he took her to the mosque, took her to a back room, and touched her through her clothing. Defendant stopped molesting her in early 1996.

Defendant testified, but did not call any other witnesses. He testified that after he returned from a visit to Mecca, all of the money in his bank account was gone. Defendant was incarcerated on a domestic violence charge, and when he returned home, he learned that S., A. and L. wanted to get married. Defendant did not want them to do so. Defendant denied molesting them, but admitted hitting them on occasion.

2. Defendant's Motion to Discharge Retained Counsel.

During trial, defendant gave the court a letter referring to witnesses that he thought would be helpful to his case. The court advised defendant that "I don't exactly know what you're asking me to do. I mean, you hired this lawyer to represent you. . . . You

have to communicate with her with regard to who your witnesses are and who would testify and so forth. . . . I don't quite understand what's happening here. Maybe you can enlighten me. . . ." Defendant informed the court that Mazza had not had "a chance to get to my witnesses." Defendant did not object when the court gave his letter to Mazza, and the court told her that "what you should do is spend some time speaking with your client."

Mazza told the court that previous counsel had informed her that he tried to reach several of the witnesses, but could not because they had changed phone numbers, moved, or did not call back. Mazza had advised defendant that she would not use character witnesses because of his domestic violence conviction, and that she could not put him on the stand because of his murder conviction. She had tried to convince defendant to take a plea bargain.

The court explained to defendant the nature of his right to testify, and that Mazza believed he should not testify because of his prior convictions. Defendant informed the court that he had witnesses who would refute the contention he left the bowling alley. The court informed defendant that he should confer with Mazza over the noon hour to determine whether he should testify. Defendant later testified on his own behalf.

3. Defendant's Habeas Petition.

In his habeas petition, defendant contends that Mazza failed to render effective assistance of counsel because she misrepresented to the court that she was ready for trial when she substituted in as his counsel, when in fact she had not spoken to him about his case except to solicit his business, and that she failed to investigate and to identify and call alibi, rebuttal and impeachment witnesses.[4]

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[4] Defendant has requested us to take judicial notice of several other cases in which Mazza has established a pattern of wrongfully soliciting clients in jail by promising good results, substituting in on the eve of trial, demanding payment of her retainer, and failing to contact witnesses and otherwise adequately prepare for trial. Those cases are *People v. Espino,* Los Angeles Superior Court Case No. GA 034669, Court of Appeal, Second Appellate District Case Nos. B134452, B144676, and B162793; *People v. Morgan,*

Defendant's habeas petition discloses that on January 7, 2002, Mazza substituted in, replacing appointed counsel Christopher Chaney. She announced she was ready for trial, representing that she had been working on the case for four months while she had been visiting defendant in jail, and thus had extensive knowledge and understanding of the case. On February 6, 2002, Mazza submitted to the prosecution a list of 24 witnesses, but admitted that she did not know who some of them were. She informed the court her court-appointed investigator wanted to interview out-of-state witnesses, to which the court replied, "[w]hen you came to this Court and asked to take over representation, you told me you were intimately familiar with this case and you [had] been working on it…" Mazza told the court that Chaney had not been ready for trial when she substituted in because witnesses had not been calling him back. Mazza also told the court she believed she would be calling four or five witnesses, but did not know their names. The prosecution informed the court it was between "a rock and a hard place" because it wanted to proceed to trial, but was concerned about an ineffective assistance claim after trial. The court found Mazza was competent, and based upon her representation that she would only rely on prosecution witnesses, excluded those witnesses on her list that were not already on the prosecution witness list.

On February 7, 2002, as trial commenced, the prosecution informed the court that defendant was upset because he had witnesses who would testify on his behalf. Mazza claimed that defendant told her there was no money to pay for one of his wives, who was one of the witnesses, to come out from New York. She informed the court that "[defendant] knows we just can't find these witnesses or they're not percipient or there's a huge issue of getting these people thrown out or they're character witnesses which I don't want to go into. I don't want to raise character, he['s] got a [domestic violence]

Los Angeles Superior Court Case No. GA 037479, *People v. Shamburger,* Los Angeles Superior Court Case No. GA 037631, and *People v. Guillen,* Los Angeles Superior Court Case No. PC 038131, Court of Appeal, Second Appellate District Case Nos. B159885. We take judicial notice of those files. (Evid. Code, §§ 451, subd. (a); 452, subd. (d).)

prior." Mazza claimed her appointed investigator was obtained to serve subpoenas on witnesses, but most of her witnesses would be prosecution witnesses, as her "whole strategy" would be cross-examination.

However, contrary to Mazza's representations to the court, Chaney's declaration in support of defendant's habeas petition states he had identified alibi and credibility witnesses, including one of defendant's wives Saadiqa Zahir and his children Maryam Zahir and Sayyid Zahir, as well as the Rev. Abdul Khan, a character witness. Chaney had contacted these witnesses prior to trial, and according to Chaney, these witnesses were all ready, willing and able to testify at trial, and would have provided an alibi for the bowling alley incident and impeached L.'s credibility.

When appellate counsel Maxine Weksler contacted these witnesses, they reiterated their desire and ability to testify on defendant's behalf. The file Weksler received from Mazza contained almost no material that had been generated by Mazza; most of the material consisted of Chaney's reports and papers pertaining to his investigation and trial preparation. The investigator Mazza employed conducted only a minimal investigation.

Weksler represented criminal defendant Martin Espino, in his appeal from a matter in which Mazza had been his trial counsel.[5] Espino's habeas petition alleged similar conduct and inadequate representation by Mazza: Espino retained Mazza because she told him she was experienced trial counsel who had won numerous cases (in fact, Mazza had only been practicing law for a year), and told him that because the charges against him were "ridiculous," his case would be dismissed. Mazza replaced his trial counsel on the date the case was called for trial, but was unprepared. She was unable to answer questions about his case, demanded more money from Espino, and failed to interview witnesses. When Weksler received the file from Mazza, it contained no trial materials. At trial, Mazza had failed to present evidence on a suppression motion, make appropriate arguments concerning his alleged confession, and failed to present psychiatric testimony

[5] We took judicial notice of this case. See footnote 4, *ante*.

concerning Espino's mental retardation. Weksler could discern no tactical reason for Mazza's decision.

Weksler is familiar with Mazza's conduct in the Morgan, Shamburger and Guillen cases. In each case, Mazza has engaged in a pattern of soliciting clients who were already represented by counsel, going to trial unprepared, and failing to prevent favorable evidence or defenses. In the Shamburger case, Mazza requested a court trial because she did not want the defendant to testify in front of a jury and be confronted with his prior convictions. After Mazza failed to call him to testify, the court noted that Mazza's conduct in that case had caused the court "grave concern," although it did not rise to the level of ineffective assistance.

DISCUSSION

I. DEFENDANT'S HABEAS PETITION ESTABLISHES A PRIMA FACIE CASE OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Defendant contends that Mazza's failure to investigate and her unpreparedness deprived him of his Sixth Amendment right to effective assistance of counsel, and that he was prejudiced by her conduct. (*Strickland v. Washington* (1984) 466 U.S. 668; Cal. Const., art. I, §§ 11, 15; *People v. Shaw* (1984) 35 Cal.3d 535, 541.) He further contends that Mazza's conduct in other cases is relevant to a determination of whether she rendered effective assistance in this case. (See *In re Vargas* (2000) 83 Cal.App.4th 1125, 1134-1138.)

The right to effective assistance of counsel derives from the Sixth Amendment right to assistance of counsel. (*Strickland v. Washington, supra,* 466 U.S. at pp. 686-674; see also Cal. Const., art. I, § 15.) To obtain a reversal of his conviction based upon ineffective assistance of counsel, appellant must show (1) counsel's conduct was deficient when measured against the standards of a reasonably competent attorney, and (2) prejudice resulting from counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as producing a just

result." (*People v. Mayfield* (1997) 14 Cal.4th 668, 784 [quoting *Strickland v. Washington*].) Prejudice is shown where there is a reasonable probability, but for counsel's errors, that the result of the proceeding would have been different. (*In re Harris* (1993) 5 Cal.4th 813, 832-833.)

Our review of counsel's performance is deferential, and strategic choices made after a thorough investigation of the law and facts are "virtually unchallengeable." (*In re Cudjo* (1999) 20 Cal.4th 673, 692.) However, defense counsel has an obligation to investigate all defenses, explore the factual bases for defenses, and evaluate the applicable law. (*People v. Maguire* (1998) 67 Cal.App.4th 1022, 1028.) The defendant "can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of the trial." (*In re Alvernaz* (1992) 2 Cal.4th 924, 933.)

In a habeas proceeding, the defendant may present evidence outside of the trial record to establish a prima facie case for habeas relief; if a prima facie case is made, we will issue an order to show cause. (*People v. Shoals* (1992) 8 Cal.App.4th 475, 502.) If we find material facts in dispute, we may transfer the matter to the superior court for an evidentiary hearing, and may confer jurisdiction on that court to either grant or deny relief based upon its factual findings. (*People v. Romero* (1994) 8 Cal.4th 728, 739-740.)

In *In re Vargas,* the defendant sought to establish ineffective assistance by showing a pattern of inadequate representation based on evidence of his attorney's performance in other cases. (*Vargas, supra,* 83 Cal.App.4th at p. 1134.) The facts in *Vargas* are strikingly similar to the instant case: The attorney substituted in, failed to investigate defense witnesses who would refute the charges of molestation, apparently lied about the scope of her investigation, and otherwise failed to prepare adequately for trial. (*Id.* at pp. 1136-1138.) *Vargas* found evidence of prior inadequate representation relevant to the question of ineffective assistance and the attorney's credibility, but required a careful examination to determine whether the evidence of prior neglect has any bearing on the case before the court. (*Id.* at pp. 1134-1136.) These facts should also be

evaluated to determine whether the attorney "lacked the ability to handle the task before her." (*Id.* at p. 1139.)

In the instant case, defendant has made a prima facie case of ineffective assistance. There are factual conflicts whether Chaney had previously contacted the witnesses and whether they were ready, willing and able to testify, or whether they were unavailable as Mazza claims. Furthermore, it is unclear whether Mazza's decision to rely on cross-examination as her defense strategy was an informed tactical decision arrived after an educated evaluation of the case, or was merely the unguided approach of an ill-prepared attorney. In this molestation case, because all of the prosecution evidence was based upon the testimony of percipient witnesses (the alleged victims), credibility and alibi witnesses would be crucial to the defense. Mazza's failure to investigate whether these witnesses would in fact testify and whether their testimony would help or hurt defendant falls below the constitutionally required reasonably competent attorney acting as a diligent, conscientious advocate. (*In re Vargas, supra,* 83 Cal.App.4th at pp. 1138-1139.) The petition is sufficient, assuming for these purposes the truth of the allegations, to establish a prima facie showing of prejudice.

We shall issue an order to show cause returnable in the superior court to conduct an evidentiary hearing on the issue of whether Mazza's performance was constitutionally deficient in failing to investigate, interview, and call these defense witnesses. If the trial court concludes Mazza's performance constituted ineffective assistance of counsel, and that a sufficient showing of prejudice has been established, then defendant must be granted a new trial.

II. NO ERROR RESULTED FROM DEFENDANT'S MID-TRIAL COMPLAINTS ABOUT HIS RETAINED COUNSEL.

Defendant argues that the court erred in denying his mid-trial motion to replace Mazza. Defendant points to his two letters to the court, which were "cries for help," and an expression of his belief in Mazza's incompetence and unpreparedness. We conclude

that the record fails to indicate that defendant informed the trial court he was seeking to discharge Mazza, and in any event, his motion was untimely.

A criminal defendant has a due process right to appear and defend with retained counsel of his or her choice. In contrast to appointed counsel, the defendant may discharge such retained counsel at any time with or without cause. (*People v. Ortiz* (1990) 51 Cal.3d 975, 983; *People v. Lara* (2001) 86 Cal.App.4th 139, 152.) While an indigent criminal defendant must prove inadequate representation in order to obtain new appointed counsel, a defendant employing retained counsel is not required to satisfy the requirements of *Marsden*[6] in order to discharge retained counsel. However, the trial court, in its discretion, may deny a motion to discharge retained counsel if discharge will result in "'significant prejudice' to the defendant" or if the request is untimely and will result in "'disruption of the orderly processes of justice.'" (*People v. Ortiz, supra*, 51 Cal.3d at p. 983.) A court faced with a request to discharge retained counsel must "balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution." (*Lara, supra,* 86 Cal.App.4th at p. 153.) A request is generally untimely if made on the eve of trial. (See, e.g., *People v. Lau* (1986) 177 Cal.App.3d 473, 479 [request made literally as jury selection commenced untimely]; *People v. Turner* (1992) 7 Cal.App.4th 913, 919 [substitution on first day of trial untimely]; cf. *People v. Stevens* (1984) 156 Cal.App.3d 1119, 1124, 1128-1129 [request made two weeks before trial timely].) Reversal is automatic where a defendant has been deprived of his right to discharge retained counsel. (*Ortiz, supra,* 51 Cal.3d at p. 988.)

Here, the defendant did not ask to discharge retained counsel, nor did defendant's complaints about Mazza require any formal inquiry. Instead, defendant informed the court that Mazza had not called certain witnesses who he believed would be helpful to his defense, and Mazza informed the court that she had explained to defendant potential problems with putting on some of these witnesses. Furthermore, even if we were to deem

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[6] *People v. Marsden* (1970) 2 Cal.3d 118.

defendant's letters and complaints to the court as a request to discharge Mazza, the mid-trial request was untimely because defendant's request could not be granted without substantial disruption to the proceedings.[7]

III. DEFENDANT'S CONVICTIONS DO NOT VIOLATE THE EX POST FACTO CLAUSE BECAUSE SECTION 803, SUBDIVISION (g) WAS ENACTED BEFORE THE STATUTE OF LIMITATIONS EXPIRED.

Zahir argues that his convictions violate the Ex Post Facto Clause of the U.S. Constitution[8] under *Stogner v. California*[9] because he was convicted of lewd behavior upon L. occurring during the period January 1, 1990, through July 16, 1993, after the statute of limitations had run on those offenses. He contends that because the version of section 803, subdivision (g) in effect at the time the information was filed in this matter had not been enacted prior to the expiration of the statute of limitations, his convictions must be reversed.[10] We disagree.

Section 803, subdivision (g) was effective January 1, 1994. (Stats. 1993, ch. 390, § 1.) Section 803(g) provided that where certain enumerated sex offenses were committed on a victim who was a minor at the time, but where the applicable limitations period specified in section 800 or 801 had expired, a criminal complaint would nonetheless be timely if it was filed within one year of the date of a report to law

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[7] To the extent that defendant now contends the court erred in permitting Mazza to substitute in as his counsel in the first instance, the argument is without merit. Defendant was entitled to counsel of his choosing; the fact that the substitution in hindsight was a mistake after Mazza's alleged incompetence became manifest is not grounds for reversal on appeal. His argument that her withdrawn request for a continuance, made at the February 6, 2002 hearing, can be the basis of error on the part of the trial court (rather than counsel) is similarly without merit.

[8] U.S. Const., Art. I, § 10, cl. 1.

[9] *Stogner v. California* (2003) 123 S.Ct. 2446.

[10] These 13 counts comprise the totality of defendant's convictions (counts 4 and 10 through 21). As noted *infra,* we reverse defendant's conviction on count 4 on other grounds.

enforcement concerning the alleged offense. After the January 1, 1994 effective date of section 803, subdivision (g), California courts split over the issue of applying the statute to crimes for which the limitations period had expired at the time of the statute's enactment. (*People v. Frazer* (1999) 21 Cal.4th 737, 745.) Effective January 1, 1997, section 803, subdivision (g) was amended to explicitly provide for its retroactive application, thus resolving the conflict.[11] (Stats. 1996, ch. 130, § 1.) The statute nonetheless "retained, without substantive change, all language that had been part of the 1994 law." (*Frazer, supra,* at p. 746.) *Frazer* specifically found that the 1997 version "sought to 'clarify,' through express 'retroactivity' and 'revival' provisions, that section 803(g) permitted charges to be filed within one year of the victim's report, even where prosecution of the crime was otherwise time-barred before January 1, 1994." (*Id.* at p. 753.)

Most importantly, however, *Frazer* upheld section 803, subdivision (g) against an *Ex Post Facto* Clause challenge when applied to crimes where the statute had already run when section 803, subdivision (g) was enacted. (*People v. Frazer, supra,* at pp. 760, 765.)

Subsequently, in *Stogner v. California,* the U.S. Supreme Court held that the 1997 version of section 803, subdivision (g) violated the *Ex Post Facto* Clause of the U.S. Constitution because it inflicted punishment where the party was not, by law, liable to any punishment. (*Stogner, supra,* 123 S.Ct. at pp. 2450-2451.) "[A] law enacted after expiration of a previously applicable limitations period violates the *Ex Post Facto* Clause when it is applied to revive a previously time-barred prosecution." (*Id.* at p. 2461.) The Court relied on *Calder v. Bull* and its four categories of ex post facto laws, primarily

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[11] Section 803, subdivision (g) was again amended, effective as of June 30, 1997, but the amendment "did not disturb core provisions" of the statute. (Stats. 1997, ch. 29, § 1; *Frazer, supra,* 21 Cal.4th at p. 749.)

those creating liability where none existed before.[12] (*Id.* at p. 2450, citing *Calder v. Bull* 3 Dall. 386, 389.) "California's new statute therefore 'aggravated' Stogner's alleged crime, or made it 'greater than it was, when committed,' in the sense that, and to the extent that, it 'inflicted punishment' for past criminal conduct that (when the new law was enacted) did not trigger any such liability." (*Id.* at p. 2451.) *Stogner* specifically noted that its holding did not affect extensions of unexpired statutes of limitation. (*Id.* at pp. 2450-2451, 2453.)

Zahir argues that because the 1997 version substantively changed the statute, the 1997 version controls the ex post facto analysis; because the limitations period on his offenses against L. had run at the time of its enactment, *Stogner* requires reversal of his convictions.

We reject this argument. Whether the changes to section 803 were merely a clarification or a material restatement of the law is a question of California, not federal law, and we must follow *Frazer* on that issue. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) *Frazer* found that the 1997 version retained without substantive change all of the language of the 1994 version, and was only meant to clarify that the 1994 version was retroactive. (*People v. Frazer, supra,* 21 Cal.4th at pp. 746, 749, 753.) Therefore, the 1994 version controls our analysis. We conclude the ex post facto prohibitions of *Stogner* do not apply here because at the time the original 1994

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[12] These categories include (1) laws "declaring acts to be treason, which were not treason, when committed," (2) laws "inflicting punishments, where the party was not, by law, liable to any punishment," (3) laws inflicting "greater punishment[] than the law annexed to the offense," and (4) laws violating the rules of evidence by permitting lesser evidence to suffice as proof. (*Stogner v. California, supra,* 123 S.Ct. at p. 2450, citing *Calder v. Bull,* 3 Dall. at p. 389.) In finding section 803, subdivision (g) violated the Ex Post Facto Clause, *Stogner* also relied on the fourth type of law permitting conviction on a reduced quantum of evidence on the rationale that the stale evidence permitted by revived claims was the equivalent of a lowered evidentiary burden. (*Stogner, supra,* at p. 2452.)

version was enacted, the six-year statute of limitations[13] had not run on Zahir's offenses (Counts 4 and 10 through 21), and Zahir was therefore properly prosecuted under this statute extending the limitations period. (*People v. Robertson* (2003) 113 Cal.App.4th 389, 393-394.)

IV. DEFENDANT'S CONVICTION AND SENTENCE ON COUNT 4 IS VACATED.

Defendant was convicted on count 4 of a violation of section 288.5 for the continued molestation of L., and on counts 10-20 for violations of Penal Code section 288, subdivision (a). Defendant contends that his conviction and sentence on count 4 for violation of section 288.5 must be reversed because he cannot be convicted of continuous molestation and individual counts of molestation against the same victim occurring during the same time period; respondent concurs. We agree.

Section 288.5, subdivision (c) provides in relevant part that "No other felony sex offense involving the same victim may be charged in the same proceeding with a charge under this section unless the other charged offense occurred outside the time period charged under this section or the other offense is charged in the alternative." In *People v. Johnson* (2002) 28 Cal.4th 240, the Supreme Court held that the statute's language "charged in the alternative" also meant that a defendant could not be convicted of a violation of section 288.5 and any other felony sex offense involving the same victim. (*Id.* at p. 248.) Because defendant's conviction on count 4 involved conduct occurring during the same time period and involving the same victim as his conviction on Counts 10-21, we vacate his conviction and sentence on count 4.

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[13] The six-year limitation period of Section 800 would apply in this instance.

DISPOSITION

The judgment is affirmed in all respects, except that defendant's conviction and sentencing on Count 4 is vacated. An order to show cause, returnable in the superior court, is issued on defendant's petition for habeas corpus for the trial court to conduct an evidentiary hearing.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.